

# Exhibit 10

*United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp. et al.*

Civil Action No. 07-10248-PBS

Exhibit to the August 28, 2009 Declaration of James J. Fauci In Opposition To  
Corrected Boehringer Ingelheim Corporation and Boehringer Ingelheim Pharmaceuticals, Inc.  
Local Rule 56.1 Statement of Undisputed Material Facts  
in Support of Their Motion For Summary Judgment

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY ) MDL No. 1456  
AVERAGE WHOLESALE PRICE ) Master File No.  
LITIGATION ) 01-12257-PBS  
\_\_\_\_\_)  
)  
THIS DOCUMENT RELATES TO: ) VIDEOTAPED  
) DEPOSITION OF  
United States of America ex rel. ) THOMAS RUSSILLO  
Ven-a-Care of the Florida Keys, )  
Inc., v. Boehringer Ingelheim ) JANUARY 8, 2009  
Corp. et al., Civil Action No. )  
07-10248-PBS, and The City of )  
New York et al. v. Abbott )  
Laboratories et al., Civil )  
Action No. 03-10643-PBS. )  
\_\_\_\_\_)

(Cross-noticed captions on following pages.)

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1 IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

2 FIRST JUDICIAL DISTRICT

3 - - - - -

4 STATE OF MISSISSIPPI, )

5 Plaintiff, )

6 vs. ) Civil Action No.

7 ABBOTT LABORATORIES, INC., et al. ) G2005-2021

8 Defendants. )

9 - - - - -

10  
11  
12  
13  
14 Videotaped deposition of THOMAS RUSSILLO, a  
15 witness herein, called for examination by counsel  
16 for the plaintiff in the above-entitled matter,  
17 pursuant to notice, taken at 18800 MacArthur  
18 Boulevard, Corona del Mar Conference Room, Irvine,  
19 California, beginning at 9:01 a.m. and ending at  
20 5:06 p.m., on Wednesday, January 8, 2009, before  
21 Lisa O'Sullivan, California Certified Shorthand  
22 Reporter No. 7822, RMR, CRR.

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1 Q Are you familiar with a company called  
2 Bedford Labs?

3 A Yes, I am.

4 Q What is that?

5 A That was the name of our generic division,  
6 Ben Venue's generic division.

7 Q So Bedford Laboratories is a part of  
8 Ben Venue. Is that fair to say?

9 A That's right. That's correct.

10 Q And are you familiar with a company called  
11 Boehringer Ingelheim Pharmaceuticals, Incorporated?

12 A Yes.

13 Q If I refer to that as BIPI today, will you  
14 understand that I mean Boehringer Ingelheim  
15 Pharmaceuticals, Incorporated?

16 A Yes.

17 Q Can you describe in general the business of  
18 BIPI as of 1998? By business I mean, among other  
19 things, the types of products the company marketed  
20 and sold.

21 A To the best of my knowledge, BIPI included  
22 Ben Venue Laboratories, Roxane Laboratories, a

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1 consumer health business, and branded products.

2 Q To your knowledge, Roxane Laboratories was a  
3 part of BIPI?

4 A I believe it was.

5 Q Were you ever an employee of BIPI?

6 A I think -- I'm not sure. I told you  
7 earlier, my paycheck came from Ben Venue.

8 Q Your paycheck came from Ben Venue?

9 A Yes.

10 Q Did your paycheck ever come from any other  
11 Boehringer Ingelheim entities from the period of  
12 November 1997 until 2005?

13 A I don't believe so.

14 Q Did you have any responsibility for any  
15 portions of BIPI's business?

16 A Yes.

17 Q What responsibilities were those?

18 A At what point in time are you talking about?

19 Q Take me from 1998 up to the present, to the  
20 best of your ability.

21 A From 1997, November 1997, at the time of the  
22 acquisition, I was retained in my current title,

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1 retained as president and chief operating officer  
2 of Ben Venue Laboratories.

3 So Ben Venue Laboratories, its contract  
4 manufacturing division, and Bedford Laboratories,  
5 its generic marketing arm for injectables  
6 manufactured by Ben Venue, was under my  
7 responsibility.

8 Sometime at the end of 1998, I was also  
9 given additional responsibilities for the Roxane  
10 multisource business.

11 Q Did you ever have any responsibilities for  
12 the branded drug business?

13 A No, I did not.

14 Q What is Roxane Laboratories?

15 A Roxane Laboratories, as I understood them,  
16 was a Columbus-based manufacturing operation that  
17 had some branded products and multisource products.

18 Q And to your knowledge, you were never paid  
19 by Roxane Laboratories?

20 A That is correct.

21 Q But in the course of your employment with  
22 Ben Venue Laboratories, from some point in 1998

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1       onwards, you had responsibility for part of  
2       Roxane's business?

3           A     That's correct.

4           Q     I'm going to show you a document that the  
5       court reporter will mark as Exhibit 1.

6                     (Exhibit Russillo 001 is marked.)

7           Q     BY MR. FAUCI: As a general ground rule for  
8       whenever I show you a document, take time to  
9       familiarize yourself with it. If it's a lengthy  
10      document, I will try and direct your attention to  
11      specific points of it.

12                    Are you familiar with this document?

13          A     I don't recall actually seeing this  
14      document, but -- so I have to say no, I'm not  
15      familiar with this document.

16          Q     At the top, it says "Roxane Laboratories,  
17      Inc., Unanimous Written Consent of Directors." Do  
18      you see that?

19          A     Yes, I do.

20          Q     If you look at the last paragraph, beginning  
21      with the word "resolved."

22          A     Yes.

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1 Q Can you read that section for me?

2 A "Resolved that, effective October 23, 1998,  
3 Mr. Thomas R. Russillo, President and Chief  
4 Operating Officer of this Corporation's affiliate,  
5 Ben Venue Laboratories, Inc., of Bedford, Ohio, be,  
6 and he hereby is, assigned responsibility for the  
7 Marketing of Multisource Products, Medical Affairs,  
8 Drug Regulatory Affairs, and Scientific Affairs  
9 functions of this Corporation."

10 Q What does it mean that you were assigned  
11 responsibility for these functions?

12 A I'm not sure what this meant. I only know  
13 what happened.

14 Q Did you regard Ben Venue and Roxane as  
15 separate companies?

16 A Yes, I did.

17 Q If you were an employee of Ben Venue, why do  
18 you think you were put in charge of Roxane's  
19 marketing department?

20 A I was put in charge of Roxane's multisource  
21 marketing because they marketed generics, and Ben  
22 Venue had been marketing generics since 1992.



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1 Q From November 1997 -- oh, sorry. Strike  
2 that.

3 From the date of this document,  
4 October 1998, is it accurate to say that you were  
5 in charge for the marketing of multisource products  
6 at Roxane?

7 MS. RIVERA: Object to form.

8 THE WITNESS: I'm not sure of the exact date  
9 it happened. It was at the end of 1998.

10 Q BY MR. FAUCI: If you look at the bottom, it  
11 says, "In witness whereof, we have duly signed this  
12 instrument effective as of the 14th day of October,  
13 1998."

14 Do you see that?

15 A Yes, I do.

16 Q From that point on, do you think it's fair  
17 to say that you were in charge of Roxane's  
18 marketing?

19 MS. RIVERA: Object to form.

20 THE WITNESS: I'm not sure that that's fair  
21 to say. No.

22 Q BY MR. FAUCI: Was there a point in time at

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1     which you became in charge of Roxane's marketing  
2     department for multisource drugs?

3         A     Yes, there was.

4         Q     And was that around the 1998 time frame?

5         A     The end of 1998, yes.

6         Q     Was there anyone at Roxane that you had to  
7     report to regarding marketing decisions for  
8     Roxane's multisource products?

9             MS. RIVERA: Object to form.

10            THE WITNESS: Werner Gerstenberg was the  
11     president of Roxane Laboratories. As such, I had  
12     an obligation to keep him informed as to what was  
13     going on.

14         Q     BY MR. FAUCI: How often did you talk to  
15     Mr. Gerstenberg?

16         A     I would say weekly.

17         Q     If you made a marketing decision on a  
18     Roxane's product, did you have to run it by  
19     Mr. Gerstenberg?

20         A     Not normally, no.

21         Q     Were there occasions when you needed to have  
22     Mr. Gerstenberg approve a Roxane marketing

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1 decision?

2 A Those occasions would have been limited.  
3 And they would have been at my discretion to advise  
4 him, as he was my supervisor.

5 Q When might you have advised him of a  
6 decision that you wanted his sign-off on?

7 A I don't recall any specific ones.

8 Q Was there anyone at Boehringer Ingelheim  
9 that you had to report to regarding marketing  
10 decisions for Roxane's multisource products?

11 MS. RIVERA: Object to form.

12 THE WITNESS: As I said earlier, I reported  
13 to Werner Gerstenberg. So anything that I did as  
14 either Ben Venue COO or as head of multisource  
15 business, ultimately I reported to Werner.

16 So anything that I thought was -- that he  
17 was in need of being aware of, I would advise him  
18 of.

19 Q BY MR. FAUCI: Did you ever report to Shelly  
20 Berkle?

21 A No, I did not.

22 Q Other than Mr. Gerstenberg, can you think of

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1 anyone else that you reported to during your time  
2 from 1998 to the present -- to the end of your time  
3 at Roxane?

4 A Yes.

5 Q Who else?

6 A I reported -- Werner Gerstenberg retired in,  
7 I believe, December of 2003 and was replaced by  
8 Marty Carroll as the new CEO. I reported to him.

9 Q Anyone else?

10 A I can't think of anyone.

11 Q You said Roxane also marketed branded  
12 products?

13 A At some point in time, yes.

14 Q Are you familiar with the term "branded  
15 generic"?

16 A Yes.

17 Q What is a branded generic?

18 A As the name would indicate, it is a generic  
19 that has been given a brand name.

20 Q Who had responsibility for marketing  
21 Roxane's branded generics?

22 A At what point in time?

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1 Q 1998 onwards.

2 A Some of the branded generics became the  
3 responsibility of Roxane multisource at the end of  
4 1998. So I had responsibility, people who worked  
5 for me had responsibility.

6 Q Can you think of anyone else that had  
7 responsibilities for Roxane's branded generics?

8 A As I said, not all branded generics at  
9 Roxane were my responsibility.

10 Q Do you know whose responsibility they were?

11 MS. RIVERA: Object to form.

12 Q BY MR. FAUCI: Do you know -- let me  
13 rephrase that question.

14 For the drugs at Roxane that you did not  
15 have responsibility for marketing for, who was in  
16 charge of marketing?

17 MS. RIVERA: Object to form.

18 MR. FAUCI: That's a horrible question. Let  
19 me rephrase that.

20 Q For the branded generic drugs at Roxane, can  
21 you tell me who had responsibility for marketing  
22 decisions?

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1 MS. RIVERA: Object to form.

2 THE WITNESS: There were many branded  
3 generics. Some of those branded generics were  
4 retained by the multisource division. So for those  
5 products, I would have still had responsibility.

6 The others, the ones that were not -- they  
7 were branded generics, but they were not part of  
8 the multisource business, those products were  
9 transferred to BIPI.

10 Q BY MR. FAUCI: Who would have had  
11 responsibility for those products at BIPI?

12 A Well, there was a group of Roxane employees  
13 who managed the branded Roxane business.

14 Q Can you tell me who those people are?

15 A Again, they changed at various times. Ed  
16 Tupa would be the name that comes to mind.

17 Q Did Shelly Berkle have responsibility for  
18 Roxane's branded generic products?

19 A My recollection is that Ed Tupa at some  
20 point in time reported to Shelly.

21 Q Do you know if Mr. Berkle had responsibility  
22 for Roxane's branded generic products at any point

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1 in time?

2 MS. RIVERA: Object to form. Asked and  
3 answered.

4 THE WITNESS: I think he had oversight of  
5 that, just like I had oversight of multisource  
6 business.

7 Q BY MR. FAUCI: I'm going to direct your  
8 attention to the names at the bottom of this  
9 document, Exhibit 1. Who is Walter Poerschmann?

10 A Walter Poerschmann was a German-based  
11 employee of Boehringer Ingelheim, who was head -- I  
12 think he was head of North America and South  
13 America Ethical Pharmaceuticals.

14 Q What does Ethical Pharmaceuticals mean?

15 A Branded pharmaceuticals.

16 Q What about Philip Franks?

17 A Philip Franks was, I believe, the general  
18 counsel at the time.

19 Q And Sheldon Berkle. Can you tell me who he  
20 was?

21 A He was head of Ethical Pharmaceuticals  
22 business unit.

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1 Q Did any of Mr. Poerschmann, Mr. Franks, or  
2 Mr. Berkle have day-to-day responsibility at Roxane  
3 Laboratories?

4 A As I said, Shelly had oversight for the  
5 branded business. So that portion of the branded  
6 business that was being handled by Roxane, I guess  
7 he had some responsibility for.

8 Q And how often was Mr. Gerstenberg at Roxane?

9 A You know, I really don't know how many times  
10 he went there.

11 Q Was he based there?

12 A No, he was not.

13 Q Did you see him once a month, more than  
14 that, or less than that, in person?

15 A In relation to?

16 Q How often, to the best of your memory, was  
17 Mr. Gerstenberg present on the Roxane campus?

18 A I couldn't answer that question. I don't  
19 know.

20 Q I'm going to show you a document the court  
21 reporter is going to mark as Exhibit 2.

22 (Exhibit Russillo 002 is marked.)

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1 Q Do you think it would have been sent to  
2 people outside of the Boehringer Ingelheim family  
3 of companies?

4 A I don't know.

5 Q Next to the date, it says Ridgefield,  
6 Connecticut. Which company was based in  
7 Ridgefield, Connecticut?

8 A Ridgefield, Connecticut, to me meant BIPI.

9 Q Did it also mean BIC?

10 A It could have, yes.

11 Q Was there any difference in your mind  
12 between BIC and BIPI?

13 MS. RIVERA: Object to form.

14 THE WITNESS: I believe that BIC was the  
15 overriding holding company, and BIPI was an  
16 operating arm.

17 But as I said earlier, the Boehringer  
18 Ingelheim structure at that level was, you know,  
19 not something I was extremely familiar with.

20 Q BY MR. FAUCI: When you thought of  
21 Connecticut, you thought of Boehringer Ingelheim?

22 A That's correct.

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1 Q Is it consistent with your recollection that  
2 you and Mr. Waterer reviewed and recommended AWP  
3 changes for the multisource line of products?

4 A I don't recall doing that. No.

5 Q You don't recall doing what?

6 A Recommending AWP changes.

7 Q Do you recall approving AWP changes?

8 A I do.

9 Q Did you ever ask anyone at Boehringer  
10 Ingelheim to sign off on an AWP change that you  
11 were involved with?

12 MS. RIVERA: Object to form.

13 THE WITNESS: There would have been -- it  
14 would have been at my discretion. I would have  
15 asked Werner Gerstenberg, if I thought there was a  
16 sensitive AWP issue.

17 Q BY MR. FAUCI: Is there anyone else you  
18 would have talked to about a sensitive AWP issue?

19 A No.

20 Q What would make an AWP issue sensitive?

21 A Well, at this time --

22 MS. RIVERA: Hold on. Object to form.

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1           THE WITNESS: At this point in time, I was  
2 very sensitive to the AWP litigation that was  
3 floating around.

4           Q BY MR. FAUCI: So as of the late 1990s, you  
5 were aware that there was investigations into  
6 inflated AWPs?

7           A Yes, I was.

8           Q Let's turn to the first page of the exhibit,  
9 of the attachment, where it says, "Impact of June  
10 2000, BU Reorganization on PAC Process."

11          A Yes.

12          Q Was there a reorganization of the business  
13 unit in or around June 2000?

14          A Yes, there was.

15          Q What was the result of that?

16          A The result of that was, as best I recall,  
17 the pricing decision committees, as you've shown me  
18 in the previous things, were implemented on the  
19 brand side, and we were left pretty much on the  
20 side to do our own thing, on the multisource side.

21          Q Turn to page 4 of the document, where it  
22 says "PTC Team Post-June 2000." What is the PTC

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1 A Yes.

2 Q Why is Mr. Berkle making this presentation  
3 with you?

4 A I can't tell from the minutes what part of  
5 the presentation -- what presentation he gave.

6 Q Why would he be giving any presentation  
7 about Roxane?

8 A Because he had overall oversight for the  
9 Roxane branded business.

10 Q Let's look at BIC JURIS 0194, Boehringer  
11 Ingelheim Pharmaceuticals, Inc., BU Ethical  
12 Pharmaceuticals. And that presentation's made just  
13 by Mr. Berkle.

14 Do you see that?

15 A Yes.

16 Q And then if you turn to the next page, it  
17 says Roxane branded products included in the  
18 presentation by Mr. Berkle. Do you see that?

19 A Yes.

20 Q So is it consistent with your understanding  
21 that Mr. Berkle would be a final say-so on Roxane's  
22 branded business?

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1 MS. RIVERA: Object to form, foundation.

2 THE WITNESS: Can I have a repeat of that  
3 question?

4 MR. FAUCI: Can you repeat that?

5 (Record is read.)

6 MR. FAUCI:

7 Q Would have a final say-so.

8 A On Roxane's branded business?

9 Q Yes.

10 MS. RIVERA: Object to form, foundation.

11 THE WITNESS: I don't know if he had final  
12 say. He had a boss to whom he reported as well, so  
13 I would assume it would be Mr. Gerstenberg.

14 Q BY MR. FAUCI: But Mr. Berkle was senior in  
15 the chain of command for Roxane's branded business.  
16 Is that fair to say?

17 MS. RIVERA: Object to form.

18 THE WITNESS: He was the head of the Ethical  
19 business unit.

20 Q BY MR. FAUCI: And that included Roxane's  
21 branded business?

22 A Yes.

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1 documentation would consist of.

2 Q And so as long as she showed you that the  
3 AWP change was necessary to make Roxane's AWP's as  
4 high as its competitors, that would be enough for  
5 you to approve it?

6 A In general, that would probably be enough.

7 Q Were you concerned about the government's  
8 investigations into AWP inflations?

9 A Absolutely.

10 Q Let's look at the top e-mail from  
11 Ms. Waterer. She says, "Bob, got the information  
12 yet? Discussed it with Tom; and depending on the  
13 strength of the customer information you can pull  
14 together, he'll support it. No guarantees of  
15 getting it through."

16 Do you see that?

17 A Yes, I do.

18 Q If you were -- if it was your decision as to  
19 whether or not to approve it, why wouldn't there be  
20 any guarantee of getting it through?

21 A I don't know what she was referring to when  
22 she said that. She could have been referring no

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1 brother wants to punish, they will, so why not make  
2 some money meanwhile."

3 Do you see that?

4 A Yes, I do.

5 Q What do you understand Mr. Sykora to be  
6 referring to when he writes "big brother"?

7 MS. RIVERA: Object to form and foundation.

8 THE WITNESS: I don't know for sure. I can  
9 only speculate who he meant.

10 Q BY MR. FAUCI: Have you ever heard of the  
11 government referred to as big brother?

12 A Yes.

13 Q And you know the government was concerned  
14 about inflated AWP's?

15 A Yes.

16 Q As early as 1999?

17 A Yes, I do.

18 Q Can you think of any reason why Boehringer  
19 Ingelheim would be upset with Roxane for raising  
20 its AWP's on furosemide?

21 MS. RIVERA: Object to form.

22 THE WITNESS: What do you mean by Boehringer

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1 Ingelheim?

2 Q BY MR. FAUCI: BIC and/or BIPI.

3 MS. RIVERA: Object to form and foundation.

4 THE WITNESS: Yeah. You mean that the  
5 company would be upset?

6 Q BY MR. FAUCI: Yeah. The question is can  
7 you think of any reason why BIC and/or BIPI would  
8 punish Roxane for raising its AWP?

9 MS. RIVERA: Object to form and foundation.

10 THE WITNESS: I don't know whether in this  
11 case the AWP was actually raised or not. All I  
12 know is that I would have reviewed it. If I  
13 thought it was justified, I would have approved it.

14 And I believe that the people you're  
15 referring to, BIC or BIPI or whomever, would not  
16 have had any objection. I wouldn't have signed off  
17 on it if I thought there was going to be a problem.

18 Q BY MR. FAUCI: You wouldn't have signed off  
19 on it without their approving?

20 A I wouldn't have signed off on it if I  
21 thought it was going to be a problem.

22 If I was concerned about it, I would have

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1 called Werner Gerstenberg and told him what I  
2 thought was going on and what I thought should be  
3 done. And then he would have either agreed or  
4 disagreed.

5 Q So do you think you consulted with Werner  
6 Gerstenberg about the decision as to whether or not  
7 to raise AWP's for Roxane?

8 A Don't recall.

9 Q For furosemide, I apologize.

10 A I don't recall.

11 Q In the top e-mail from Ms. Waterer, the  
12 second paragraph down, she writes, "You've  
13 indicated that AWP on furosemide is critical now  
14 and that we'd have real business opportunities if  
15 we could change it. As you've been informed, Tom  
16 is prepared to take furosemide up the line."

17 Do you see that?

18 A Yes.

19 Q Who would you be taking furosemide up the  
20 line to?

21 A I believe she's referring to that if I  
22 needed to, I would take it up the line.

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1 Q To who?

2 A Werner Gerstenberg.

3 Q Anyone else?

4 A No.

5 Q Where is Werner Gerstenberg based?

6 A Connecticut.

7 Q What was his job function?

8 A He was the CEO of -- now, let's take it in  
9 respect. In this particular case, he would have  
10 been acting as the president of Roxane.

11 Q Was he also the president of other  
12 Boehringer Ingelheim companies?

13 A Yes, he was.

14 Q Which companies, to your knowledge?

15 A I believe he was the president of BIC.

16 Q Which was the parent company based in  
17 Connecticut?

18 A Yes.

19 Q Can you think of any other Roxane employees  
20 that were based in Connecticut?

21 A Can I think of any?

22 Q Yeah.

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1 Boehringer Ingelheim in Connecticut, unless I felt  
2 there were circumstances that I needed to review  
3 with Werner Gerstenberg.

4 Q BY MR. FAUCI: And do you recall if you felt  
5 as if there were circumstances you needed to review  
6 that related to the AWP increase for furosemide?

7 A I don't recall at this point in time,  
8 because I didn't have the data yet.

9 Q You just have no recollection one way or the  
10 other?

11 A No. I'd have to see the next series of  
12 e-mails and information that would have passed.

13 Q So it's possible that depending on what the  
14 sales justification looked like, you might have  
15 felt the need to go to Boehringer Ingelheim; is  
16 that correct?

17 A It is possible.

18 MS. RIVERA: Object to form.

19 Q BY MR. FAUCI: And you don't know one way or  
20 another whether you did?

21 A No, I don't.

22 Q Did you regard the decision to raise AWP's on

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1 furosemide as sensitive?

2 MS. RIVERA: Object to form.

3 THE WITNESS: I regarded any decision to  
4 raise AWP's as needing to be justified.

5 Q BY MR. FAUCI: You write, "Rich can assure  
6 you of the mood in BI." Do you see that?

7 A Yes.

8 Q Is "Rich" Richard Feldman?

9 A I believe that's who I'm referring to. Yes.

10 Q What do you mean, the mood in BI?

11 A The mood at Boehringer Ingelheim was the  
12 same as mine. It was very sensitive to AWP  
13 changes.

14 Q Because of its awareness of the lawsuits  
15 that had been filed?

16 A Yes.

17 Q You can put that aside. I'm going to show  
18 you an exhibit marked Exhibit 27.

19 (Exhibit Russillo 027 is marked.)

20 Q BY MR. FAUCI: This is a somewhat lengthy  
21 document. Take a moment to review it, and just  
22 indicate to me when you're ready for a question.

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1 this is a decision that you would have taken to  
2 Werner Gerstenberg?

3 A Based on the data that I've seen here and  
4 the quick review, I would say I probably did not.

5 Q What was the type of decision you would take  
6 to him?

7 A If we were raising an AWP without adequate  
8 justification, meaning I didn't see a competitor's  
9 analysis that showed we were just blending in with  
10 the rest.

11 Q So with knowledge the AWP investigations  
12 were going on, and with knowledge that this AWP  
13 increase raised the AWPs to 14 times the average  
14 contract price, that would not have been reason for  
15 you to go to Mr. Gerstenberg and say, "Is this  
16 okay?"

17 A I can't answer your question exactly,  
18 because this -- as you've seen from the e-mail  
19 trails on this and others, there were a number of  
20 these going on.

21 Once I had established Werner Gerstenberg's  
22 position on this, I would have implemented it.

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1 So -- and I don't remember eight years ago how  
2 concerned he was.

3 I might have brought it to him. I don't  
4 think I did, because we've had others before that.  
5 I knew where he stood.

6 Q Would you have done this without feeling  
7 comfortable that Mr. Gerstenberg was okay with it?

8 A I can't tell you at the time. I don't know  
9 whether I went to him or not.

10 Q You said you knew where he stood. What do  
11 you mean by that?

12 A I knew that his position was if we were  
13 meeting competitors, to stay competitive and that's  
14 why we were raising the AWP, we would not be  
15 perceived as taking advantage of the AWP.

16 Q Where did you get that understanding of  
17 Mr. Gerstenberg's position from?

18 A Over many conversations with him.

19 Q Did you have those -- was anybody else  
20 involved in those conversations?

21 A There may have been. I don't -- I don't  
22 recall the specific conversations.

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1 Q Could legal have been involved in those  
2 conversations?

3 A Could have been. Yes.

4 Q Would legal inside counsel -- were those  
5 Boehringer Ingelheim employees, or Roxane  
6 employees?

7 A Which ones?

8 Q Any inside counsel that might have been  
9 involved in those decisions.

10 MS. RIVERA: Object to form.

11 THE WITNESS: Legal services was a shared  
12 service. We did not have, within Roxane or Ben  
13 Venue, specific attorneys at that time.

14 Q BY MR. FAUCI: Where was the legal services  
15 based?

16 A Connecticut.

17 Q With Boehringer Ingelheim?

18 MS. RIVERA: Object to form.

19 THE WITNESS: Well, they were in the  
20 Boehringer Ingelheim environment. Yes.

21 Q BY MR. FAUCI: Let's show you Exhibit 30.

22 (Exhibit Russillo 030 is marked.)

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1 THE WITNESS: My boss was, and always was,  
2 Werner Gerstenberg. So yes, I was instructed to  
3 oversee that business under Werner Gerstenberg.

4 Q BY MR. ANDERSON: And you reported to Werner  
5 Gerstenberg in his role as president and CEO of  
6 BIC, Boehringer Ingelheim Corporation; correct?

7 A Yes.

8 Q Likewise, Mr. Berkle, as president of BIPI,  
9 Boehringer Ingelheim Pharmaceuticals, Incorporated,  
10 was reporting to Mr. Gerstenberg, president of BIC,  
11 with respect to the Roxane branded drugs; correct?

12 A I'm not sure.

13 MS. RIVERA: Object to form.

14 THE WITNESS: I'm not sure whether Shelly  
15 was president of BIPI or not.

16 Q BY MR. ANDERSON: Okay.

17 A He was head of the business unit Ethical  
18 Pharmaceuticals. And in that capacity, he reported  
19 to Mr. Gerstenberg.

20 Q And likewise, that reporting capacity  
21 encompassed Mr. Berkle's oversight of Roxane's  
22 branded products; correct?

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1 MS. RIVERA: Object to form and foundation.

2 THE WITNESS: Yes, I believe so.

3 Q BY MR. ANDERSON: Would it be fair to say  
4 that the Roxane multisource and branded products  
5 were managed within the Boehringer Ingelheim  
6 corporate framework after roughly 1999?

7 MS. RIVERA: Object to form.

8 THE WITNESS: Try -- I'm not sure what you  
9 mean by the question. Would you please try to  
10 rephrase it or repeat it?

11 Q BY MR. ANDERSON: Would it be fair to say  
12 that Boehringer Ingelheim was controlling the  
13 marketing of Roxane multisource products and Roxane  
14 branded products after roughly 1999?

15 MS. RIVERA: Object to form.

16 THE WITNESS: I can't define it the way  
17 you're describing it.

18 Q BY MR. ANDERSON: How would you define it?

19 A That Roxane Labs had two divisions within  
20 Roxane: One that handled the brand piece; one that  
21 handled the multisource piece. And the person who  
22 oversaw them on the multisource side was me, and

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1 the person that oversaw them on the Roxane branded  
2 side was Shelly Berkle.

3 Q And both you and Mr. Berkle did not actually  
4 work for Roxane; correct?

5 A I don't believe Shelly did. I know I  
6 didn't.

7 Q But instead, were managing those two aspects  
8 of Roxane's business at the direction of Boehringer  
9 Ingelheim; correct?

10 MS. RIVERA: Object to form.

11 THE WITNESS: When you say Boehringer  
12 Ingelheim, if you mean Werner Gerstenberg, the  
13 answer is yes.

14 Q BY MR. ANDERSON: Is that what -- is that  
15 consistent with your understanding?

16 A Is what consistent?

17 Q That Mr. Gerstenberg, as the head of BIC,  
18 was directing you and Mr. Berkle to manage Roxane's  
19 business.

20 A Yes.

21 Q Likewise, when Mr. Carroll became the  
22 president of BIC and replaced Mr. Gerstenberg, did

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1 the same arrangement exist?

2 A Yes, it did.

3 MS. RIVERA: Object to form.

4 Q BY MR. ANDERSON: All right. This morning,  
5 I think you testified at one point that AWP is  
6 arbitrary. Do you recall that testimony?

7 A Yes, I do.

8 Q I'm switching gears, by the way.

9 A That's okay.

10 Q I'm sure you picked up on that. Can you  
11 elaborate on what you mean by that?

12 A There's a whole lot of different adjectives  
13 you could use. You know, arbitrary meaning it's  
14 not an important number. It's a misnomer. It's  
15 not average wholesale price in three sense -- the  
16 sense of the three words.

17 It's -- as I think I explained earlier, it  
18 is the way we enter the market by listing a price,  
19 typically 10 percent off the brand.

20 Q Are you familiar with how AWPs are set for  
21 brand drugs?

22 A No, I am not.

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1 manner in which Roxane priced its drugs?

2 A I recall reviewing pricing. I recall taking  
3 a look at sales figures, profit figures. In all of  
4 that context, I'm sure we looked at the way they  
5 priced.

6 You know, this was 10 years ago. I just  
7 don't remember the exact details.

8 Q I believe you testified this morning that in  
9 connection with evaluating Roxane pricing, Roxane  
10 did consider relative AWP spreads; is that correct?

11 A Yes.

12 MS. RIVERA: Object to form.

13 Q BY MR. ANDERSON: Is that one of the issues  
14 that you considered in evaluating the Roxane  
15 pricing?

16 MS. RIVERA: Object to form.

17 THE WITNESS: The way we would have done it  
18 is we looked at the market share. We looked at the  
19 pricing of the competitors and asked the question  
20 why, if we were competitively priced, we weren't  
21 getting more business, and what we needed to do.

22 Q BY MR. ANDERSON: And one mechanism that

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1 Roxane could increase its sales would be by  
2 matching relative spreads of other generic  
3 companies; correct?

4 MS. RIVERA: Object to form.

5 THE WITNESS: Matching spreads? What do you  
6 mean by that?

7 Q BY MR. ANDERSON: Raising AWP's or decreasing  
8 market prices to match relative spreads being  
9 offered on competitive generic drugs.

10 A We would raise AWP's if competitors' pricing  
11 was higher than ours and we had to match up to it.  
12 Yes. We would do that.

13 Q And was that done with authority from  
14 Boehringer Ingelheim?

15 MS. RIVERA: Object to form.

16 THE WITNESS: That was my decision to do it.

17 Q BY MR. ANDERSON: And did you believe that  
18 was authorized?

19 A Yes, I did.

20 Q By your superior, Mr. Gerstenberg, on behalf  
21 of BI?

22 MS. RIVERA: Object to form.

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1 THE WITNESS: By my superior.

2 Q BY MR. ANDERSON: Did you ever receive any  
3 form of discipline from Mr. Gerstenberg about the  
4 way in which Roxane had priced its drugs?

5 A I don't recall any. No.

6 Q Did you ever receive any type of negative  
7 feedback or complaints from anyone about -- anyone  
8 that was superior to you in the Boehringer  
9 organization about the way Roxane's drugs were  
10 priced?

11 A That's a difficult question to answer,  
12 because we were constantly looking at our profit  
13 and loss statements and trying to maximize our  
14 potential.

15 So as --

16 Q It's too broad.

17 A -- a business unit operator, I was under  
18 constant -- I won't say warning, but I was always  
19 told, you know, do -- keep doing a better job.

20 Q I understand. I'll be a little more  
21 specific, because that was pretty broad.

22 Did you ever receive any negative feedback

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1 who want big spreads, do you have any information  
2 about the government being aware of the magnitude  
3 of AWP spreads?

4 MS. RIVERA: Object to form.

5 THE WITNESS: I believe that the people who  
6 were responsible for the Medicare system knew that  
7 AWP was not the list price that people were paying.

8 Q BY MR. ANDERSON: And I understand that  
9 you're testifying to that, sir. I want to  
10 understand the basis for that testimony.

11 A I have no proof.

12 Q Okay, all right. Did you consult with any  
13 lawyers with respect to the legality of Roxane's  
14 AWP practices?

15 A As a result of the lawsuits, our practices  
16 were reviewed by lawyers who did investigations.

17 Q Lawyers for which company?

18 A Lawyers acting on behalf of Boehringer  
19 Ingelheim.

20 Q And without disclosing any of the content of  
21 your communications with those lawyers, did you  
22 learn of any changes in the way AWPs for Roxane

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1 products were set?

2 A No, I did not.

3 Q So as far as you know, despite the existence  
4 of lawsuits and government investigations and  
5 congressional investigations, the way in which  
6 Roxane sets AWP's has remained the same?

7 MS. RIVERA: Object to form.

8 Go ahead.

9 THE WITNESS: As far as I know, it hasn't  
10 changed.

11 Q BY MR. ANDERSON: Would you say that there  
12 was synergy or an economies of scale for Roxane,  
13 Ben Venue, Bedford, BIPI, and BIC to operate as one  
14 company?

15 MS. RIVERA: Object to form.

16 THE WITNESS: I think the intent of merging  
17 the multisource businesses was that there were  
18 synergies. I don't believe there were that many.

19 Q BY MR. ANDERSON: And the purpose in  
20 transitioning the different companies to operate as  
21 one was to save money; right?

22 MS. RIVERA: Object to form. Misstates

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1 Q Is this the document that had like your name  
2 and Judy Waterer's name?

3 A Yes, I believe so.

4 MS. RIVERA: Hold on. I think I know what  
5 you might be talking about. They all -- all these  
6 e-mails look alike.

7 MR. FAUCI: This one?

8 MR. ANDERSON: Try Exhibit 11.

9 MS. RIVERA: This right here?

10 THE WITNESS: No. Yeah, it could be. Maybe  
11 it is.

12 I think this was a proposal that never  
13 happened, though. This is not the one that was ...

14 Q BY MR. ANDERSON: Do you recall, sir, other  
15 than you and Judy Waterer, who else was part of  
16 this pricing approval process?

17 A Yeah. I'm looking at this form, and there  
18 are names here that would probably have been common  
19 to that. So besides Judy Waterer, there would have  
20 been somebody from contracts. If not John Powers,  
21 someone else.

22 There would have been somebody from finance.

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1 The finance guy was in Roxane. I don't remember  
2 his first name, but Lewis was his name.

3 And there was a controller who worked -- who  
4 he worked for. I don't remember whether both of  
5 those people were on it. I don't recall whether  
6 legal signed it or not in the early stages. This  
7 proposal added legal to it, I believe.

8 Q And you're referring to the proposal set  
9 forth in Exhibit 11?

10 A Yes.

11 Q And that reference to legal that would have  
12 been added, at least as of the date of that  
13 document, would have been the Boehringer Ingelheim  
14 legal department; correct?

15 MS. RIVERA: Object to form.

16 THE WITNESS: I believe it would have been  
17 an attorney who was part of the contracts and  
18 processing group.

19 Q BY MR. ANDERSON: For which company?

20 A For BIPI.

21 Q BIPI, yes, sir.

22 A But he would be again acting in his capacity

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